

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH EVERETT JOHNSON, JR.,

No. C 05-2258 SI (pr)

Plaintiff,

**ORDER DENYING MOTIONS TO  
DISMISS AND FOR JURY TRIAL  
AND SETTING BRIEFING  
SCHEDULE**

v.

Deputy HENSEL; et al.,

Defendants.

Joseph Everett Johnson, Jr. filed this pro se civil rights action under 42 U.S.C. § 1983, concerning incidents that occurred while he was incarcerated at the Santa Clara County Jail. Defendants now move to dismiss on the grounds that (a) Johnson has not exhausted administrative remedies for his claim concerning events on April 21, 2005, and (b) has not stated a claim for relief for retaliation based on the events on April 5 and April 28, 2005. Plaintiff opposes the motion.

Federal Rule of Civil Procedure 12(b)(6) permits a defendant to move to dismiss on the ground that there is a "failure to state a claim upon which relief may be granted." A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); NL Ind., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. Id.

Defendants argue that the retaliation claim concerning the April 21, 2005 incident must be dismissed because administrative remedies were not exhausted before this action was filed. A Rule 12(b)(6) motion is the wrong vehicle to make such an argument. A prisoner's failure to exhaust administrative remedies is a matter in abatement. A defendant has the burden of raising

1 and proving the absence of exhaustion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.), cert.  
 2 denied, 124 S. Ct. 50 (2003). The proper way to establish nonexhaustion is by an unenumerated  
 3 Rule 12(b) motion rather than in a motion for summary judgment or Rule 12(b)(6) motion.  
 4 See id. Defendants' motion also fails because defendants have not provided sufficient  
 5 information about the existence and operation of an administrative appeal system in the Santa  
 6 Clara County Jail so that the court could determine that the inmate exhausted the remedies  
 7 available in that system.<sup>1</sup> This evidentiary deficiency highlights why a Rule 12(b)(6) motion is  
 8 not the right vehicle to raise the argument: defendants must rely on matters outside the pleadings  
 9 and go beyond the allegations of the complaint to prove the existence and operation of the  
 10 inmate appeal system.

11 Defendants also argue dismissal is required because Johnson does not state a § 1983 claim  
 12 for relief for retaliation with respect to the incidents on April 5 and April 28, 2005 in that he  
 13 does not allege a sufficient chilling effect or lack of a legitimate correctional goal to support a  
 14 retaliation claim for those incidents. The court disagrees. A retaliation claim does not require  
 15 a plaintiff to "demonstrate a total chilling of his First Amendment rights;" a plaintiff may state  
 16 a claim if the official's acts are of the sort that would chill or silence a person from future First  
 17 Amendment activities. See Rhodes v. Robinson, 408 F.3d 559, 568-69 (9th Cir. 2005).  
 18 According to the complaint, Johnson received an involuntary transfer to more unpleasant  
 19 quarters on April 5 and was threatened with criminal prosecution and possible harm on April 28,  
 20 2005 by sergeant Schumaker while sergeant Southward was present. It cannot be said that  
 21 Johnson can prove no set of facts which would entitle him to relief consistent with the  
 22 allegations of the complaint. At this point, the court merely considers the sufficiency of the  
 23 allegations of the complaint and in doing so, gives the pro se complaint the liberal construction  
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25 <sup>1</sup>While the court can consult the California Code of Regulations to determine how the  
 26 California Department of Corrections & Rehabilitation administrative appeal process works for  
 27 state prisoners, there is no comparable body of law to consult for each county. County jail  
 28 defendants usually must submit declarations and/or jail operations manuals to prove that an  
 inmate appeal process exists as well as to prove the steps needed to exhaust an inmate appeal  
 before the court can determine that a county jail inmate has not exhausted his administrative  
 appeals.

1 to which it is entitled. The complaint adequately pleads § 1983 claims for retaliation.

2 For the foregoing reasons, defendants' motion to dismiss is DENIED. (Docket # 8.) The  
3 rejection of defendants' motion to dismiss merely addresses the question of the sufficiency of  
4 the pleading. Defendants are not foreclosed from filing a motion for summary judgment and/or  
5 an unenumerated Rule 12(b) motion (or a combined motion), at which time the court can  
6 consider evidence beyond the face of the complaint.

7 Plaintiff's motion to set a jury trial is DENIED as premature in that defendants' answer  
8 has not been filed and defendants may wish to file a further dispositive motion. (Docket # 13.)

9 In light of the denial of the motion to dismiss and in order to expedite the resolution of  
10 this case, the following briefing schedule for dispositive motions is set:

11 a. No later than **September 29, 2006**, defendants must file and serve a motion  
12 for summary judgment or other dispositive motion. If defendants are of the opinion that this case  
13 cannot be resolved by summary judgment, they must so inform the court prior to the date the  
14 motion is due.

15 b. Plaintiff's opposition to the summary judgment or other dispositive motion  
16 must be filed with the court and served upon defendants no later than **November 3, 2006**.

17 c. If defendants wish to file a reply brief, they must file and serve the reply  
18 brief no later than **November 17, 2006**.

19 IT IS SO ORDERED.

20 Dated: July 24, 2006



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SUSAN ILLSTON  
United States District Judge